DATO' SERI DR M MAHADEVAN A

v.

PANCHANATH MAHALINGAM RATNAVALE & ORS

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
CLEMENT SKINNER JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: P-02-960-2011]
11 JUNE 2013 C

LAND LAW: *Vacant possession - Claim for - Whether respondents occupying land as trespassers - Whether registered owner held land as trustee - Whether land held by appellant in trust for respondents as beneficiaries of residuary estate of deceased until letters of administration granted - Whether trial judge acted in excess of jurisdiction - Whether trial judge misdirected himself as to locus standi of respondents to commence counterclaim - Allegation of fraud and undue influence - Standard of proof - Balance of probabilities - Whether correctly applied - Rules of the High Court 1980, O. 15 r. 15 & O. 92 r. 4* D E

TRUSTS: *Resulting trust - Circumstances when such a trust would arise - Claim for vacant possession - Whether respondents occupying land as trespassers - Whether registered owner held land as trustee - Whether land held by appellant in trust for respondents as beneficiaries of residuary estate of deceased until letters of administration granted - Rules of the High Court 1980, O. 15 r. 15 & O. 92 r. 4* F

The appellant commenced an action in the Magistrate's Court against the respondents for vacant possession of a piece of land with a house built thereon, Lot 747, No. 10, Scotland Road, Penang ('Lot 747'), and claimed damages. The basis of the appellant's claim was that he was the registered owner of Lot 747 which the respondents were occupying as trespassers without his permission or consent. The first respondent was the nephew of the appellant, being the son of the appellant's brother, Ratnavale a/l Mahalingam ('Ratnavale'), who had died on 9 April 1973, the second respondent was the wife of Ratnavale and the third respondents were the occupants of the house. The respondents filed a defence and counterclaim, claiming that in 1956, Ratnavale had purchased a piece of land known as Lot 151 ('Lot 151') and registered the same in the name of his mother, Madam Ratnammal d/o Veerasingam ('Madam Ratnammal') to be held in trust for G H I

Ratnavale. The respondents further alleged that Ratnavale had sold part of Lot 151 to a developer but retained a portion of Lot 151 which was subdivided into several separate lots known as Lots 743, 744, 745, 746 and 747. Alternatively, the respondents pleaded that as Ratnavale had provided all the money to purchase the said lots, the registered owner held the said lots at all material times as trustee and not as owner of the same. The respondents also alleged that unknown to them, Madam Ratnammal transferred four of the lots to the appellant. The respondents pleaded that the appellant had obtained the transfer of the four lots into his name through fraud and undue influence. The respondents counterclaimed for a declaration that the appellant held Lots 743, 744, 745, 746 and 747 as trustee for and on behalf of all the respondents as beneficiaries of the residuary estate of Ratnavale. The respondents made an application by way of an originating summons to the High Court. At the end of the trial, the High Court judge found that there was no basis for the appellant's claim and dismissed it. With regard to the respondents' counterclaim, the learned judge found that the respondents had successfully proved their case against the appellant and ruled that Lots 743, 744, 745 and 747 were held by the appellant in trust for the respondents as beneficiaries of the residuary estate of Ratnavale until letters of administration of the residuary estate was granted. The appellant, in appealing against the said decision, submitted that the learned judge had erred: (i) when he had acted in excess of his jurisdiction and re-wrote the will of Ratnavale dated 10 February 1971, appointing the appellant and another brother, one Sandra Segara Mahalingam, as executors of his will, and misdirected himself as to the *locus standi* of the respondents to commence the counterclaim; (ii) in holding that there was a resulting trust pursuant to which Ratnammal purportedly held Lots 743, 744, 745 and 747 in trust for Ratnavale and by virtue thereof, the appellant held the said lots in trust for the respondents; and (iii) when the wrong standard of proof was applied in relation to the allegations of fraud and undue influence raised against the appellant.

Held (dismissing the appeal with costs)
Per Clement Skinner JCA delivering the judgment of the court:

(1) The five lots which were subdivided from Lot 151 were registered in the name of Madam Ratnammal on 28 September 1972 which was well before the death of Ratnavale. Further,

it was Madam Ratnammal who transferred the four lots to the appellant in 1972 and 1981 respectively. Therefore, the transfer of the five lots to Madam Ratnammal had nothing whatsoever to do with the provisions in the will of Ratnavale. The same could be said about the transfer from Madam Ratnammal to the appellant of the four lots – it had nothing to do with the provisions of the will. Accordingly, there was no substance to the contention that the learned judge had re-written the will of Ratnavale without there being a challenge or setting aside of the said will. (para 19)

(2) In respect of the residuary estate of Ratnavale constituted by the four lots, there were no letters of administration granted yet. In such circumstances, under O. 15 r. 15 of the Rules of the High Court 1980 then applicable, the court could appoint a person to represent the residuary estate for the purposes of the proceedings. Further, under O. 92 r. 4 of the Rules of the High Court 1980, the court has inherent powers to make any order as may be necessary to prevent injustice. The learned judge had not erred or misdirected himself when he ordered that the four lots be transferred to the legal representative of the residuary estate of Ratnavale. (para 21)

(3) The respondents did not seek the declaratory relief as beneficiaries under the last will of Ratnavale. Instead, the respondents were asserting that the appellant was a trustee of the four lots registered in his name which lots formed part of the residuary estate of Ratnavale, which were not covered by the last will of Ratnavale. The respondents clearly had a right to seek the declaration prayed for. (para 22)

(4) While it was true that the respondents did allege fraud and undue influence against the appellant, the respondents had pleaded an alternative case in trust *ie*, that since Ratnavale had advanced the full purchase price, the registered owner held the said lots at all material times as trustee and not as owner. The learned judge had granted the declaration sought by the respondents as he was satisfied that the respondents' alternative claim of a trust had been made out. To succeed in obtaining the declaratory relief which they sought, it was only necessary for the respondents to prove that a trust existed. (para 24)

(5) The appellant was fully aware of Ratnavale's beneficial ownership of the lots. The appellant, as attorney of Ratnavale, had made payments from the Chartered Bank Account in Ratnavale's name to the contractor for quit rent and to the architect for the construction of the houses. In making the above payments, the appellant had knowledge of the purpose of such payments. In light of the evidence regarding the knowledge of the appellant in respect of the said lots, the appellant was thus a trustee for Lots 743, 744, 745 and 747. (paras 33, 34, 36 & 37)

(6) The standard of proof in respect of the allegation of trust is proof on a balance of probabilities, which the learned judge had correctly applied. The learned judge did say that the appellant had acted dishonestly and that the appellant had taken away the four lots, but a proper reading of his judgment showed that the basis for his grant of relief to the respondents was his finding of trust. In the circumstances, the respondents' counterclaim was not unreasonable nor was it defeated by delay or laches. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memulakan tindakan di Mahkamah Majistret terhadap responden-responden untuk milikan kosong sebidang tanah dengan sebuah rumah yang dibina atasnya, Lot 747, No. 10, Scotland Road, Penang ('Lot 747'), dan telah memohon ganti rugi. Dasar permohonan perayu adalah bahawa dia adalah pemilik berdaftar Lot 747 yang diduduki oleh responden-responden sebagai penceroboh-penceroboh tanpa kebenaran atau persetujuannya. Responden pertama adalah anak saudara kepada perayu, iaitu anak lelaki kepada abang perayu, Ratnavale a/l Mahalingam ('Ratnavale'), yang telah meninggal dunia pada 9 April 1973, responden kedua adalah isteri kepada Ratnavale dan responden ketiga adalah penduduk-penduduk rumah itu. Responden memfailkan pembelaan dan tuntutan balas, dengan dakwaan bahawa pada tahun 1956, Ratnavale telah membeli sebidang tanah yang dikenali sebagai Lot 151 ('Lot 151') dan didaftarkan dalam nama emaknya, Madam Ratnammal a/p Veerasingam ('Madam Ratnammal') untuk dipegang sebagai amanah untuk Ratnavale. Responden-responden juga mendakwa bahawa Ratnavale telah menjual sebahagian dari Lot 151 kepada seorang pemaju tetapi mengekalkan sebahagian Lot 151 yang telah dibahagikan kepada beberapa lot berasingan iaitu Lot-Lot 743, 744, 745, 746 dan

747. Secara alternatif, responden-responden telah memplid bahawa oleh kerana Ratnavale menyediakan semua wang untuk pembelian lot-lot tersebut, pemilik berdaftar memegang lot-lot tersebut pada setiap masa material sebagai pemegang amanah dan bukannya sebagai pemilik. Responden-responden juga mendakwa bahawa tanpa pengetahuan mereka, Madam Ratnammal telah memindah milik empat lot kepada perayu. Responden-responden memplid bahawa perayu telah memperolehi pemindah milik empat lot ke namanya melalui penipuan dan pengaruh yang tidak wajar. Responden-responden seterusnya membuat tuntutan balas untuk satu deklarasi bahawa perayu memegang Lot-Lot 743, 744, 745, 746 dan 747 sebagai pemegang amanah bagi pihak responden sebagai benefisiari-benefisiari estet bakian Ratnavale. Responden-responden membuat permohonan melalui saman pemula kepada Mahkamah Tinggi. Di akhir perbicaraan, hakim Mahkamah Tinggi mendapati bahawa tiada asas bagi tuntutan perayu dan telah menolaknya. Berhubungan dengan tuntutan balas responden-responden, yang arif hakim mendapati bahawa responden-responden telah berjaya membuktikan kes mereka terhadap perayu dan memutuskan bahawa Lot-Lot 743, 744, 745 dan 747 telah dipegang oleh perayu sebagai pemegang amanah untuk responden-responden sebagai benefisiari-benefisiari estet bakian Ratnavale sehingga surat-surat pentadbiran estet bakian diberikan. Perayu, dalam rayuannya terhadap keputusan tersebut, berhujah bahawa yang arif hakim telah khilaf: (i) apabila beliau telah bertindak melebihi bidang kuasa dan menulis semula wasiat Ratnavale bertarikh 10 Februari 1971, yang telah melantik perayu dan lagi satu abang iaitu Sandra Segara Mahalingam, sebagai wasi wasiat, dan telah tersalah arah berkenaan *locus standi* responden-responden memulakan tuntutan balas; (ii) dalam memutuskan terdapat amanah berbangkit akibat tindakan Ratnammal yang dikatakan memegang Lot-Lot 743, 744, 745 dan 747 dalam amanah untuk Ratnavale, dan berikutan itu perayu telah memegang lot-lot tersebut dalam amanah untuk responden-responden dan (iii) apabila yang arif hakim menggunapakai standard pembuktian yang salah berhubungan dengan dakwaan-dakwaan penipuan dan pengaruh tidak wajar yang dibangkitkan terhadap perayu.

Diputuskan (menolak rayuan dengan kos)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Kelima-lima lot yang telah dibahagi dari Lot 151 telah didaftar atas nama Madam Ratnammal pada 28 September 1972 iaitu sebelum kematian Ratnavale. Juga, ia adalah Madam Ratnammal yang telah memindah milik empat lot kepada perayu pada tahun 1972 dan 1981. Oleh itu, pindah milik lima lot itu kepada Madam Ratnammal tiada kaitan dengan peruntukan-peruntukan di dalam wasiat Ratnavale. Ini juga sama dengan pindah milik empat lot kepada perayu yang dibuat oleh Madam Ratnammal yang tidak mempunyai kaitan dengan peruntukan-peruntukan wasiat tersebut. Dengan itu, tiada isi hal dalam hujahan bahawa yang arif hakim telah menulis semula wasiat Ratnavale tanpa terdapatnya cabaran atau pengenepian wasiat tersebut.

(2) Berkenaan estet bakian Ratnavale yang terdiri daripada empat lot itu, tiada surat-surat pentadbiran yang diberikan lagi. Dalam keadaan sedemikian, di bawah A. 15 k. 15 Kaedah-Kaedah Mahkamah Tinggi 1980 yang digunapakai sebelum ini, mahkamah boleh melantik seseorang untuk mewakili estet bakian bagi tujuan prosiding. Juga, di bawah A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah mempunyai kuasa sedia ada untuk membuat perintah sebagaimana yang perlu untuk mengelakkan ketidakadilan. Yang arif hakim tidak khilaf atau tersalah arah apabila beliau membuat perintah supaya empat lot itu dipindah milik kepada wakil undang-undang estet bakian Ratnavale.

(3) Responden-responden tidak menuntut pengisytiharan relif sebagai benefisiari-benefisiari di bawah wasiat terakhir Ratnavale. Sebaliknya, responden-responden telah menegaskan bahawa perayu adalah pemegang amanah empat lot yang telah didaftarkan di dalam namanya di mana lot-lot itu menjadi sebahagian daripada estet bakian Ratnavale, yang tidak dilindungi oleh wasiat terakhir Ratnavale. Dengan jelasnya, responden-responden mempunyai hak untuk menuntut pengisytiharan yang dituntut.

(4) Walaupun ia adalah benar bahawa responden telah mendakwa terdapat penipuan dan pengaruh tidak wajar terhadap perayu, responden-responden juga telah memplid kes alternatif dalam amanah iaitu oleh kerana Ratnavale telah membuat bayaran

penuh, pemilik berdaftar telah memegang lot-lot tersebut pada setiap waktu material sebagai pemegang amanah dan bukan sebagai pemilik. Yang arif hakim telah memberi pengisytiharan yang dituntut oleh responden-responden kerana beliau berpuas hati bahawa tuntutan alternatif responden-responden berkenaan amanah telah dibuktikan. Untuk berjaya mendapatkan pengisytiharan relif yang dituntut, responden-responden hanya perlu membuktikan bahawa satu amanah telah wujud.

(5) Perayu menyedari sepenuhnya milikan benefisial Ratnavale berhubungan lot-lot itu. Perayu, sebagai peguam Ratnavale, telah membuat bayaran daripada Chartered Bank Account dalam nama Ratnavale kepada kontraktor, untuk cukai tanah dan kepada arkitek untuk pembinaan rumah-rumah. Dalam membuat bayaran-bayaran tersebut, perayu mempunyai pengetahuan berkenaan tujuan bayaran-bayaran tersebut. Berdasarkan keterangan berkenaan pengetahuan perayu-perayu berhubungan lot-lot tersebut, perayu oleh itu adalah pemegang amanah Lot-Lot 743, 744, 745 dan 747.

(6) Standard pembuktian berkenaan dakwaan amanah adalah atas imbangan kebarangkalian, yang telah digunapakai dengan betul oleh yang arif hakim. Yang arif hakim telah menyatakan bahawa perayu telah bertindak dengan tidak jujur dan perayu telah merampas empat lot itu, tetapi jika penghakiman yang arif hakim dibaca dengan betul, ia menunjukkan bahawa asas bagi pemberian relif kepada responden-responden adalah berdasarkan dapatan amanah itu. Dalam keadaan sedemikian, tuntutan balas pihak responden bukanlah tidak munasabah dan ia juga tidak ditewaskan oleh kelewatan atau kelambatan.

Case(s) referred to:

Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(refd)***

Koh Siew Keng & Anor v. Koh Heng Jin [2008] 3 CLJ 450 CA ***(refd)***

Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1992] 1 LNS 7 HC ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 15, O. 92 r. 4

A *For the appellant - Vijaya Segaran (Maruli Achan & P Mituran with him); M/s K Kulasekar & Achan*
For the respondents - Mura Raju (Govindaraju with him); M/s G Raju & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-458-2000]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

C **Clement Skinner JCA:**

[1] We had earlier dismissed the appellant's appeal. These are our reasons for doing so.

D **[2]** This case started off at the Magistrate's Court where the appellant commenced an action against the respondents for vacant possession of a piece of land with a house built thereon known as Lot 747, No. 10, Scotland Road, Penang (hereafter "Lot 747"). The appellant also claimed damages. The basis of the
E appellant's claim was that he was the registered owner of Lot 747 which the respondents were occupying as trespassers without his permission or consent.

[3] The respondents are related to the appellant. The first respondent is the nephew of the appellant, being the son of
F Ratnavale a/l Mahalingam ("Ratnavale") a brother of the appellant. The second respondent is the wife of Ratnavale. The third respondents are the "occupants" of the house. The pleadings of the respondents show that the other children of Ratnavale were living at house No. 10, namely:

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(a) Jaganathan a/l Mahalingam Ratnavale;

(b) Dr Mahalakshmini a/p Mahalingam Ratnavale;

(c) Dr Jeyalakshimini a/p Mahalingam Ratnavale; and

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(d) Dr Jeyaratnam a/p Mahalingam Ratnavale.

[4] The respondents filed a defence and counterclaim in the Magistrate's Court action. In their defence the respondents
I claimed that in 1956 Ratnavale had purchased a piece of land known as Lot 151, PB3 Daerah Timur, Pulau Pinang ("Lot 151") and registered the same in the name of his mother Madam

Ratnammal d/o Veerasingam to be held in trust for Ratnavale. The respondents further alleged that Ratnavale sold part of Lot 151 to a developer but retained a portion of Lot 151 which was subdivided into several separate lots known as Lots 743, 744, 745, 746 and 747, which were registered in the name of Madam Ratnammal to be held in trust for Ratnavale. Alternatively the respondents pleaded that as Ratnavale had provided all the money to purchase the said lots, the registered owner held the said lots at all material times as trustee and not as owner of the same.

[5] It was the respondents' case that Ratnavale submitted and was approved building plans to erect three units of detached houses and two units of semi-detached houses on the five subdivided lots but Ratnavale only managed to build two semi-detached houses on Lots 746 and 747 and one detached house on Lot 743. House No. 10 Scotland Road which is the subject matter of the appellant's suit was built on Lot 747.

[6] The respondents alleged that after house No. 10 was completed sometime in 1972, all Ratnavale's family including his mother Madam Ratnammal stayed at house No. 10 on Lot 747 and they have done so without having to obtain the permission of the appellant. On 9 April 1973 Ratnavale passed away.

[7] In their defence the respondents also alleged that unknown to them, Madam Ratnammal transferred four of the lots to the appellant, namely;

(i) On 30 September 1972, Lot 743 and Lot 744 were transferred to the appellant for a consideration of RM25,000;

(ii) On 13 August 1981, Lot 745 was transferred to the appellant for love and affection;

(iii) On 13 August 1981 Lot 747 (ie, house No. 10) was transferred to the appellant for love and affection.

It needs to be mentioned that on 3 January 1975 Madam Ratnammal transferred Lot 746 to her son-in-law S Mariampillai for a consideration of RM70,000.

[8] The respondents also pleaded that the appellant obtained the transfer of the four lots into his name through fraud and undue influence. The respondents accordingly sought by way of counterclaim, a declaration that the appellant held Lots 743, 744, 745, 746 and 747 as trustee for and on behalf of all the

A respondents as beneficiaries of the residuary estate of Ratnavale (deceased) until letters of administration for his residuary estate was issued. The respondents also claimed damages and for the revenue from the lots since 1973.

B **[9]** In view of the reliefs claimed by the respondents, an application by way of an originating summons was made to the High Court, Pulau Pinang, by the first and second respondents as well as four other children of Ratnavale, to transfer the case to the High Court. An order to transfer was obtained on 29 April
C 1999.

The High Court Decision

[10] At the High Court the appellant gave evidence on his own behalf as plaintiff. For the defendants/respondents five persons
D gave evidence:

(a) Ng Kum Tuck (DW1) who was the architect for the three houses built on the lots;

E (b) Fam Kim Moy (DW2) the second wife of Ratnavale;

(c) Annalakshmi Ratnavale (DW3) the first wife of Ratnavale;

(d) Dr Jeyalakshmi a/p Ratnavale the daughter of Ratnavale;

F and

(e) Dr Jeyaratnam a/l Ratnavale the son of Ratnavale.

[11] At the end of the trial the learned High Court Judge found that there was no basis for the appellant's claim, so he dismissed
G it with costs. With regard to the respondents' counterclaim, the learned judge found that the respondents had successfully proved their case against the appellant and ruled that Lots 743, 744, 745 and 747 were held by the appellant in trust for the respondents as beneficiaries of the residuary estate of Ratnavale until letters of
H administration of the residuary estate is granted. The learned judge did not make any order in respect of Lot 746 as the respondents did not pursue their claim in respect of the same. The learned judge did not grant the respondents claim for damages or for the revenue earned from the lots.

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[12] The learned judge made two further orders when granting judgment on the respondent's counterclaim. They were that: A

(a) the appellant deliver the issue document of title to the four lots to the respondent's solicitors within 30 days; and

(b) the appellant sign the memoranda of transfer in respect of the four lots to Dr Jeyalakshmi d/o Ratnavale as the legal representative of the estate of Ratnavale and that in the event the appellant fails to do so, the Deputy Registrar of the High Court of Penang be empowered to sign the same. B C

[13] Before turning to consider the merits of the appeal, two other matters need to be mentioned here. First, when the three houses being built on the lots were nearing completion, Ratnavale fell ill and gave a power of attorney in favour of the appellant who used it to operate a bank account in Ratnavale's name at Chartered Bank, Ipoh. Secondly, when Ratnavale passed away on 9 March 1973 he died leaving a will appointing the appellant and another brother one Sandra Segara Mahalingam as executors of his will. Probate of Ratnavale's last will has been granted to the executors named and apparently administration of his estate has been completed. It is in evidence that the executors decided that all Ratnavale's properties should be distributed to his mother Madam Ratnammal only. D E

This Appeal F

[14] The principal grounds of appeal against the decision of the learned judge are as follows:

(i) The learned judge erred when he acted in excess of his jurisdiction and rewrote the will of Ratnavale dated 10 February 1971, and misdirected himself as to the *locus standi* of the respondents to commence the counterclaim; G

(ii) The learned judge erred when he misdirected himself in holding that there was a resulting trust pursuant to which Ratnammal purportedly held Lots 743, 744, 745 and 747 in trust for Ratnavale and by virtue thereof the appellant held the said lots in trust for the respondents; H

(iii) The learned judge had misdirected himself when he applied the wrong standard of proof in relation to the allegations of fraud and undue influence raised against the appellant; and I

(iv) Laches.

[15] We now turn to consider each ground.

The Learned Judge Erred When He Acted In Excess Of His Jurisdiction And Rewrote The Will Of Ratnavale Dated 10 February 1971, And Misdirected Himself As To The Locus Standi Of The Respondents To Commence The Counterclaim

[16] The contention of the appellant is that by his last will, Ratnavale had left all his "movable and immovable property" of whatsoever nature or description to his wife Annalakshmi, his mother Madam Ratnammal and his six children "in whatever proportion my said trustees at their discretion shall choose to distribute". Therefore, according to the appellant, under Ratnavale's will, the executors (meaning the appellant and Sandra Segara) were given a wide discretion to distribute Ratnavale's estate in whatever proportion as deemed appropriate by them. However, according to the appellant, the order made by the learned judge has the effect of rewriting the will of Ratnavale which is already probated, without there being a legal challenge or setting aside of the said will. In doing so, the appellant complains that the learned judge acted in excess of his jurisdiction and without regard to the interest of all the beneficiaries named in the will, namely, Madam Ratnammal and Manorani (a daughter who is not a defendant in the action) while the order seeks to confer a benefit on Fan Kim Moi (DW2) the second wife of Ratnavale who is not named as a beneficiary under the will.

[17] The appellant also complains that by ordering that the transfer documents for the four lots be executed to Dr Jeyalakshmi as the personal representative of the estate of Ratnavale, the learned judge had acted in total disregard of the provisions of the last will of Ratnavale appointing the appellant and Sandra Segara as executors thereof. The appellant says the appointment of Dr Jeyalakshmi is without legal basis and in fact the respondents have no *locus standi* or capacity to commence the counterclaim and obtain the remedies they sought from the High Court as only the duly appointed legal representative of the estate of Ratnavale may make such a claim and not the beneficiaries of his estate. In support the case of *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20; [1977] 1 MLJ 52 was relied on by the appellant. In that case the Federal Court held that the only person who has a right to bring action on behalf of an estate are the legal representatives appointed for the estate and not the beneficiaries of the estate.

[18] We find no merit in the above contentions. These contentions were not raised in the appellant's pleadings nor in the submissions before the learned judge. The appellant says he should nevertheless be allowed to raise these points as they relate to the jurisdiction of the High Court to make the orders it did.

[19] We do not agree with the jurisdiction point or that the learned judge acted in excess of jurisdiction as alleged. The evidence shows that all the five lots which were subdivided from Lot 151 were registered in the name of Madam Ratnammal on 28 September 1972 which was well before the death of Ratnavale. Further, it was Madam Ratnammal who transferred the four lots to the appellant in 1972 and 1981 respectively. Therefore the transfer of the five lots to Madam Ratnammal had nothing whatsoever to do with the provisions in the will of Ratnavale. The same can be said about the transfer from Madam Ratnammal to the appellant of the four lots - it had nothing to do with the provisions of the will. Accordingly there is no substance to the contention that the learned judge had "rewritten" the will of Ratnavale without there being a challenge or setting aside of the said will. The short answer to the latter contention is that there was no need to challenge the will as the transfer of the five lots to Madam Ratnammal was not made pursuant to the provisions of the will.

[20] The respondents' case is that the four lots were being claimed as part of the residuary estate of Ratnavale and hence they sought the declaratory relief they prayed for. The learned judge found on the evidence before him that the appellant is a trustee for Lots 743, 744, 745 and 747 for and on behalf of the residuary estate of Ratnavale until letters of administration of the estate are issued.

[21] To give effect of the declaration he had granted, the learned judge was invited by the respondents to make further orders or give directions which the learned judge did by making the two further orders which the appellant now complains about as being made without any legal basis. We do not agree. The respondents had also prayed for "such further or other relief deemed fit" and it must have been apparent to the learned judge that in respect of the residuary estate of Ratnavale constituted by the four lots, there were no letters of administration granted yet. In such circumstances it is our view that under O. 15 r. 15 of the Rules of the High Court 1980 ('1980 Rules') then applicable, the court

A can appoint a person to represent the residuary estate for the purposes of the proceedings. Further, under O. 92 r. 4 of the 1980 Rules the court has inherent powers to make any order as may be necessary to prevent injustice. In the circumstances we do not think the learned judge erred or misdirected himself when he
B ordered that the four lots be transferred to Dr Jeyalakshmi as the legal representative of the residuary estate of Ratnavale.

[22] With regard to the appellant's contention that the respondents had no *locus standi* to bring the counterclaim as they
C are merely beneficiaries of Ratnavale's estate and not the appointed legal representatives thereof, we see nothing in the point taken because the respondents did not seek the declaratory relief as beneficiaries under the last will of Ratnavale. Instead the respondents are asserting that the appellant is a trustee of the four
D lots registered in his name which lots form part of the residuary estate of Ratnavale which are not covered by the last will of Ratnavale. In our view the respondents clearly had a right to seek the declaration prayed for. It is also our view that the case of *Deraman & Ors v. Mek Yam (supra)* is distinguishable on its facts
E from the case here.

The Learned Judge Erred When He Misdirected Himself In Holding That There Was A Resulting Trust Pursuant To Which Ratnammal Purportedly Held Lots 743, 744, 745 And 747 In Trust For Ratnavale And By Virtue Thereof The Appellant Held The Said Lots In Trust For
F *The Respondents*

[23] The appellant contends that the respondents' claim of a resulting trust between the respondents and the appellant is misconceived because the evidence shows that the four lots were
G not transferred to the appellant by Ratnavale but by Ratnammal. Therefore, according to the appellant, a resulting trust, if it exists, can only exist between Ratnavale and Ratnammal. So in order to succeed in defeating the appellant's title to the said lots, it is the appellant's contention that the respondents must establish that
H the appellant was guilty of fraud in obtaining a transfer of the said lots from Ratnammal's name to his name. The appellant says that not only did the respondents fail to establish fraud against him but they in fact abandoned their claim in fraud and sought to rely solely on the concept of a resulting trust. Therefore the appellant
I contends that the learned judge was wrong in concluding that because Ratnammal held the said lots in trust for Ratnavale (or his estate) *ipso facto* the appellant also held the said lots in trust for

Ratnavale's estate and consequently for the respondents. According to the appellant, the respondents should have brought in the estate of Madam Ratnammal as a party to the suit and first establish a trust in favour of the respondents, which was not done.

[24] We do not agree with the appellant's contentions. While it is true that the respondents did allege fraud and undue influence against the appellant, the respondents had also pleaded an alternative case in trust ie, that since Ratnavale had advanced the full purchase price the registered owner held the said lots at all material times as trustee and not as owner. A reading of his judgment shows that the learned judge granted the declaration sought by the respondents as he was satisfied that the respondents alternative claim of a trust had been made out. It is our view that to succeed in obtaining the declaratory relief which they sought, it was only necessary for the respondents to prove that a trust existed. The respondents did not also need to prove fraud and undue influence against the appellant as contended by the appellant.

[25] There was also no evidence before the High Court that the five lots which had been registered in Ratnammal's name before four of those lots were transferred to the appellant were listed as part of the assets of Madam Ratnammal's estate when she passed away on 29 December 1994. Therefore we find no substance in the appellant's contention that the estate of Madam Ratnammal should have been brought in as a party to this suit.

[26] A reading of his judgment shows that the learned judge came to a finding of fact that it was Ratnavale and not Madam Ratnammal who had provided the funds to purchase Lot 151. The learned judge also came to a finding of fact that it was Ratnavale and not Madam Ratnammal who provided the funds to build the three houses on the lots. In coming to those findings the learned judge had accepted and relied on the evidence of the two wives of Ratnavale ie, Fam Kim Moy (DW2) and Annalakshmi Ratnavale (DW3) with regard to the purchase of Lot 151 by Ratnavale. DW2 gave evidence to the effect that she had accompanied Ratnavale in his car when he went to the lawyer's office to pay the balance of the purchase price for Lot 151 which was later registered in Madam Ratnammal's name, but it was she (DW2) who stayed at the house (No. 19) built on Lot 151 where three

of her four children were born. DW3 gave evidence to the effect that it was her husband (Ratnavale) who had bought Lot 151 but had put it in his mother's name.

[27] With regard to the building of the houses on three of the five lots, in arriving at his finding that it was Ratnavale and not Madam Ratnammal who had provided the funds to do so the learned judge accepted and relied mainly on the evidence of three witnesses. One of the three was DW2 who testified that at that material time when the houses were being built Madam Ratnammal was a bankrupt and she (DW2), on Ratnavale's instructions, had to sell her property known as Jesselton House, to raise RM30,000 to settle Madam Ratnammal's bankruptcy. The learned judge also relied on the evidence of Dr Jeyalakshmi a/p Ratnavale (DW4) who gave evidence relying on the documentary evidence before the court to show that payments made to the contractors came from Ratnavale. The learned judge found that the most material evidence on this issue was given by Ng Kum Tuck (DW1) whom the learned judge regarded as an independent witness. DW1 was the architect for the three houses constructed on Lot 743, 746 and 747. DW1 testified to the effect that in 1969 he prepared the contract documents to build the three houses on Lot 151 on the instructions of Ratnavale and that he (DW1) had never met Madam Ratnammal at any time during the construction or after the completion of the houses. DW1 also confirmed in his evidence that it was Ratnavale who engaged him and gave all the instructions for the construction of the three houses. DW1 also confirmed that all the certificates of payment were issued in the name of Ratnavale and that DW1 knew that Ratnavale had paid the contractors because DW1 received copies of letters from the contractors asking for payment and also acknowledging payments made to them by Ratnavale. DW1 confirmed that the houses were completed in 1972 or 1973.

[28] At the trial DW4 confirmed that even though the construction contract for the three houses was in Madam Ratnammal's name, it was actually signed by Ratnavale whose signature DW4 recognised. The appellant also confirmed in evidence that Madam Ratnammal's signature does not appear on the construction contract.

[29] On the basis of the evidence outlined above the learned judge came to the following findings: A

At para. 22 of his judgment:

> The evidence of Ratnavale's two widows, namely Fam Kim Moy (DW2) and Annalakshmi Ratnavale (DW3) and Dr. Jeyalakshmi (DW4) were very credible, unshaken and can be accepted though no document of purchase of Lot 151 were produced. The evidence of DW2 and DW3 adduced in Court is sufficient enough in proving the existence of fact to establish a resulting trust. It was held in the case of *S.T.U. v. Controller of Income Tax* [1962] 28 MLJ 221 … B C

And at para. 32 of his judgment:

> As said earlier, the evidence of these witnesses were consistent unshaken, not contradicted by other evidence and is not inherently improbable. Therefore, it ought to be accepted. Their testimonies satisfied the Court in believing the truth of their evidence. The Defendant's claim is not based on mere speculation, conjectures and confusion. The evidence, taken in its totality also demonstrates unequivocally that a resulting trust was in existence at all times where Madam Ratnammal was holding the 5 Lots on trust for her son, Ratnavale who advanced the purchase price for the said property. D E

[30] In our judgment the learned judge was fully entitled to come to the above findings based on the oral and documentary evidence that was led before him. We do not think that the learned judge's findings which was based on his appreciation and evaluation of the evidence can be faulted. Also it should not be overlooked that nowhere in his statement of claim or in his defence to counterclaim did the appellant assert that Lot 151 was purchased by Madam Ratnammal. F G

[31] Although the appellant had maintained in his evidence that his mother Madam Ratnammal had used her own money to build the houses on the lots, the learned judge did not find that to be so as there was no evidence produced in support of her having done so. In fact the learned judge said that her ability to provide the funds were very much in question as Madam Ratnammal was at the material time a bankrupt (see paras 23 and 24 of his judgment). Again we do not think the learned judge erred in coming to that finding. H I

[32] It is clear to us that the learned judge came to a finding on the facts that Madam Ratnammal was holding the five lots on trust for her son Ratnavale. And it is also evident to us that at para. 12 of his judgment the learned judge found that the appellant was a trustee for Lots 743, 744, 745 and 747 for the respondents, but the learned judge did not say that there was a resulting trust between the appellant and the respondents as what the appellant has put forward in his submissions.

[33] It is also evident to us from what he said in paras. 19 and 35 of his judgment that the learned judge found that the appellant was fully aware of Ratnavale's beneficial ownership of the lots. In our view the learned judge's finding is supported by the following evidence:

(a) where the appellant as attorney of Ratnavale had made payments from the Chartered Bank account in Ratnavale's name to the contractor, for quit rent and to the architect for the construction of the houses on three of the five lots.

(b) the appellant as Ratnavale's attorney had made payments from the Chartered Bank account to reduce Ratnavale's overdraft at Public Bank which had been used by Ratnavale to pay the contractors of the three houses.

[34] In making the above payments and operating the above account the appellant clearly would have knowledge of the purpose of such payments and that Ratnavale was building the three houses on Lots 743, 746 and 747 and that the payment for the construction was made by Ratnavale and not Madam Ratnammal. The appellant had also admitted in cross-examination that he knew that Lots 743-747 were subdivided lots from Lot 151.

[35] With regard to the appellant's state of knowledge of Ratnavale's beneficial interest in the said lots, there is also the evidence of the architect DW1 who testified in cross-examination that the appellant had visited the houses towards the completion of their construction because Ratnavale was ill. DW1 had said in cross-examination at p. 289 record of appeal:

> I've met the Plaintiff (Appellant) before. I met him around 1970-1972 when the job was about to be completed. The role that the Plaintiff (Appellant) played at the time, Mr Ratnavale was not well,

so Plaintiff (Appellant) was asked to come and oversee the work. I don't know who asked him to see the work. Plaintiff (Appellant) told me that he was asked to see the progress.

[36] In the light of the above evidence regarding the knowledge of the appellant in respect of the said lots, we agree with the finding of the learned judge that the appellant is a trustee for Lots 743, 744, 745 and 747.

[37] We also agree with the submission of learned counsel for the respondents that in the fact pattern described above a constructive trust arises by operation of law, in that, by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another the law will impose a constructive trust. See *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450; [2008] 3 MLJ p. 832.

[38] The appellant also complained that the finding of the learned judge that he (the appellant) was a trustee of the said lots was erroneous as the learned judge had (a) failed to caution himself of the dangers of accepting the evidence of the respondents to the effect that Madam Ratnammal held the said lots in trust when Madam Ratnammal was no longer around to refute the allegation; (b) failed to consider that DW2, DW3, DW4 and DW5 were interested witnesses; (c) failed to consider the probability that Madam Ratnammal had paid for Lot 151 in 1956 as there was evidence to show that she was in a financial position to do so, in that, DW2 had said in cross-examination that Ratnammal and her husband had enough money to take care of the children and owned estates and properties including a piece of land in Gemas.

[39] The appellant also drew attention to the fact that in the schedule of assets and liabilities of the estate of Ratnavale it is disclosed that Ratnavale was indebted to Madam Ratnammal in the sum of RM97,855 and that in queries from the Estate Duty Office, it was stated that Madam Ratnammal's bankruptcy was as a result of Ratnavale's failure to pay debts incurred by him. The appellant drew further attention to the fact that in a reply to the Estate Duty Office dated 30 August 1975 it was stated that Madam Ratnammal was the owner of the land Lot 151.

[40] We do not agree with the above submissions. As we said earlier, the learned judge had correctly evaluated the evidence before him. We do not think there was any need, on the facts of this case, for the learned judge to "warn" himself before accepting the evidence of the respondents' witnesses. The learned judge said that their credibility was not shaken in cross-examination and that their evidence was not inherently improbable. We agree with these findings of the learned judge.

[41] With regard to the matters stated in the Schedule of Assets and liabiliaties of Ratnavale's estate, the evidence at p. 613 record of appeal shows that the alleged owing of RM97,855 was not allowed as a liability by the Estate Duty Office. And as far as the replies and answers given to queries from the Estate Duty Office are concerned, the reply that Madam Ratnammal was the owner of Lot 151 does not take the appellant's case much further as it is not the respondents case that she was not the registered owner of the land. Their case is that she held it in trust for Ratnavale.

[42] The appellant also submitted that the learned judge had failed to consider the following facts which allegedly contradict the conclusion that Ratnavale paid for the purchase of Lot 151 in 1956. The appellant referred to the fact that there was no evidence that Ratnavale was in a financial position in 1956 to pay for Lot 151; that if the lots formed part of the estate of Ratnavale, the respondents would not have waited more than 25 years from Ratnavale's demise before making their claim; that no credible reason was advanced why, if Ratnavale had paid for Lot 151, he put it in Madam Ratnammal's name instead of his own.

[43] We do not agree with the above submissions. We find no substance in them. There is evidence that Ratnavale was a person of means. He was employed as a Deputy Controller of Foreign Exchange when he bought Lot 151. There is also evidence that he had supported the appellant as well as Sandra Segara and Savanathan while they were in college overseas. With regard to the 25 years wait before the respondents made their claim, it must not be overlooked that it was DW2's evidence that soon after the purchase of Lot 151, she moved into house No. 19 which was on Lot 151 and lived there for many years until house No. 19 was demolished to make way for the construction of the three houses on the subdivided lots. Then when house No. 10 was completed on Lot 747 in 1972 the whole family moved into the

house without seeking Madam Ratnammal's or the appellant's permission or consent nor did they pay any rentals for the same. Further, the respondents did not know of the appellant's ownership of the lot until 5 February 1997 when they were served the notice to quit by the appellant's solicitors.

[44] Although the respondents do not seem to have offered an explanation why Ratnavale had registered Lot 151 in his mother's name, that evidence has to be weighed against the other probabilities in the case. If Ratnavale had not purchased Lot 151, is it probable that he would apply for building permission and sign an agreement with the contractors and pay for the construction of not just one but three houses on the lots subdivided out of Lot 151? Further, is it probable that if he did not beneficially own the lots subdivided out of Lot 151, would Ratnavale grant a power of attorney in favour of the appellant so that his account at Chartered Bank Ipoh could be used to raise an overdraft of RM60,000 on the security of shares in public-listed companies owned by Ratnavale, so that the proceeds of the overdraft can be used to reduce his account at Public Bank from which the contractors had been paid? If Ratnavale was not the beneficial owner of Lot 151 is it probable that he would allow house 19, which he and his family were living in, to be demolished to make way for three houses which he paid for to be built on the subdivided lots he did not beneficially own? The answer to all these questions which must be answered in the respondents' favour show that the learned judge was correct when he held that the respondents' assertion that Ratnavale had purchased Lot 151 is consistent with the probabilities of the case.

The Learned Judge Had Misdirected Himself When He Applied The Wrong Standard Of Proof In Relation To The Allegations Of Fraud And Undue Influence Raised Against The Appellant

[45] In our judgment, while it is correct to say that the learned judge had misdirected himself when he failed to recognise that in civil cases where an allegation of fraud and undue influence is raised which involved an element of dishonesty, which from his judgment the learned judge had found to be the case, then the standard of proof to be applied is that of proof on a beyond a reasonable doubt basis and not on a balance of probabilities (see *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 at p. 233 FC). However we find that this misdirection was not critical or

material nor did it have a bearing on the ultimate decision in this case. It is clear to us from a reading of his judgment that the learned judge decided to grant the declaration sought on the basis of the respondents' alternative plea of a resulting trust in para. 4(ii) of their defence and counterclaim. This is very clear from reading paras. 19 and 20 of his grounds of judgment. The standard of proof in respect of the allegation of trust is proof on a balance of probabilities, which the learned judge had correctly applied. The learned judge did say that the appellant had acted dishonestly and that the appellant had taken away the four lots, but we are satisfied that a proper reading of his judgment shows that the basis for his grant of relief to the respondents was his finding of a trust.

Laches

[46] The appellant finally raised the issue of laches. We find that as the issue was not pleaded by the appellant in his defence to the respondents' counterclaim nor was it raised in submissions before the learned judge, we should not allow the appellant to do so now.

[47] Even if it can be argued that the appellant should be allowed to do so, we find no substance in the allegation. The appellant complains of the long delay and acquiesence by the respondents in making this claim. The case law referred to us on the point shows that the question whether there is acquiescence and laches is a matter that must be decided on the facts of each case (see *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244; [1979] 1 MLJ 183, see *Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1992] 1 LNS 7; [1989] 2 MLJ 202).

[48] It is reasonable to say that a person can only be said to have acquiesced to a state of things if he is aware of it. Likewise, for the respondents to have asserted their rights against the appellant, they must first be aware that the appellant had become the owner of the lots in question. However the evidence led in the High Court and which was accepted by the learned judge was that the appellant had not given notice of his ownership of the four lots and the respondents were unaware of the appellant's ownership of the same. The evidence also shows that the appellant did not collect any rentals from the respondents and the

respondents had been in continued occupation of house No. 10 Scotland Road since the completion of the house in 1972. It was only when they were served the notice to quit that they became aware of the appellant's ownership, their grandmother Madam Ratnammal having moved out of the house in 1994 to go to live in Kuala Lumpur without informing them of the transfer to the appellant.

[49] In the circumstances we do not find the counterclaim of the respondents unreasonable nor is it defeated by delay or laches.

[50] In the result, it was for all the above reasons that we dismissed the appeal with costs.